

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In Re:

Herbert Fanniel  
Mary Fanniel

NOTICE OF HEARING AND  
MOTION FOR RELIEF FROM  
AUTOMATIC STAY

Debtors

Chapter 7, Case No. 04-34507  
-----

TO: Herbert Fanniel and Mary Fanniel, INCLUDING TRUSTEE AND OTHER  
INTERESTED PARTIES

1. Citibank, N.A., as Trustee, ("Movant"), a corporation, by its attorneys, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion at 10:30 am on September 7, 2004, in Courtroom 228B, 316 North Robert Street, St. Paul, MN 55101 or as soon thereafter as counsel can be heard.

3. Any response to this motion must be filed and delivered not later than on September 1, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and holidays), or filed and served by mail not later than August 26, 2004, which is seven days before the time set for the hearing (excluding Saturdays, Sundays and holidays).

UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, FRBP Nos. 5005 and Local Rule 1070-1. This is a core proceeding. The Chapter 7 case was filed on August 3, 2004, and is now pending in this court.

5. This motion arises under 11 U.S.C. § 362 and Federal Rules of Bankruptcy Procedure 4001, and is filed under Federal Rules of Bankruptcy Procedure 9014 and Local Rules 1201-1215. Movant requests relief with respect to the property of Debtors, subject to a mortgage to Movant.

6. Debtors above-named are the owners of certain real property located at 7145 Upper 163rd Street West, Rosemount, MN 55068, legally described as follows, to-wit:

Lot 17, Block 5, Donnay's Valley Park 6th

7. The indebtedness of Herbert Fanniel and Mary Fanniel is evidenced by a Promissory Note and Mortgage dated January 30, 2002, filed of record in the Dakota County Recorder's office on May 1, 2002, and recorded as Document No. 1891572. A true and correct copy of the front page of the recorded mortgage is attached as Exhibit A. Said mortgage was subsequently assigned to Movant.

8. The Debtors have failed to pay monthly mortgage payments since December 1, 2003, and are in default in the amount of \$15,349.66 together with reasonable attorneys fees and costs incurred pursuant to the note and mortgage. Debtors have failed to make any offer of adequate protection. Accordingly, Movant's interest is inadequately protected.

9. The total amount due under the mortgage and note as of the date of hearing is approximately \$182,900.00.

10. The Debtors have estimated the value of the homestead as \$190,000.00, and accordingly, Debtors have limited equity in the premises and, presuming typical selling costs, have no equity in the property and therefore cause exists to find lack of adequate protection.

11. The undersigned attorneys have commenced foreclosure proceedings, which proceeding was terminated as a result of the filing of the bankruptcy petition on August 3, 2004.

12. By reason of the foregoing, Movant is entitled to have the automatic stay lifted and vacated so it can recommence the mortgage foreclosure action pursuant to Minnesota Statutes.

WHEREFORE, Movant by its undersigned attorney, moves the Court for an Order that the automatic stay provided by 11 U.S.C. Section 362 (A) be terminated to permit Movant to foreclose its mortgage on the subject property, and for such other and further relief as may be just and equitable.

Dated: August 19, 2004

USSET & WEINGARDEN P.L.L.P

By: /E/ Paul A. Weingarden/Brian H. Liebo  
Paul A. Weingarden, #115356  
Brian H. Liebo #277654  
Attorney for Movant  
4500 Park Glen Road, #120  
Minneapolis, MN 55416  
(952) 925-6888

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In Re:

Herbert Fanniel  
Mary Fanniel

AFFIDAVIT OF PETITIONER

Debtors

Chapter 4, Case No. 04-34507  
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STATE OF California )

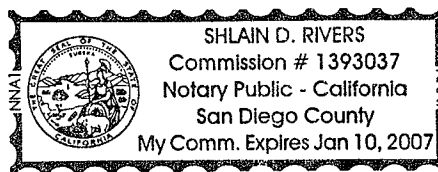
COUNTY OF San Diego )

Robin Williams, being first duly sworn, deposes and states on oath that she/he is employed by Chase Manhattan Mortgage Corporation as servicer for Citibank, N.A., as Trustee, the movant in this action, that she/he has read the annexed Notice of Hearing and Motion for Relief From Automatic Stay, and that it is true of her/his knowledge to the best of her/his information.

Robin Williams

Subscribed and sworn to before me this  
13 day of August, 2004.

Shlain D. Rivers  
Notary Public



ACT 42202

1891572

OFFICE OF THE COUNTY RECORDER  
DAKOTA COUNTY, MINNESOTA  
CERTIFIED THAT THE WITHIN INSTRUMENT  
WAS RECORDED IN THIS OFFICE ON AND AT

2002 MAY -1 A 9:20

1891572

DOC. NO. 1891572  
JOEL T. BECKMAN, COUNTY RECORDER  
BY *[Signature]* Deputy

FEB 20.00 SURCHARGES 20

CASH ☐ CHECK ☒ ESCROW ☐

WELL ☐ CHARGE ☐

CHARGE TO: \_\_\_\_\_

O/R \_\_\_\_\_

DO NOT REMOVE

RETURN TO:  
EXCEL TITLE  
7380 FRANCE AVENUE SOUTH  
MINNEAPOLIS, MN 55435

DAKOTA COUNTY TREASURER-AUDITOR  
64/38/2002 11:16:46 669199  
REGISTRATION TAX 366.33  
COUNTY CONSERVATION FEE 5.08  
RECEIPT NUMBER 522882

[Space Above This Line For Recording Data]

## MORTGAGE

1891572

Return To:  
Chase Manhattan Mortgage  
Corp.  
Att: Loan Boarding Dept.,  
10790 Rancho Bernardo Rd,  
San Diego, CA 92127

### DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated January 30, 2002 together with all Riders to this document.

1094578090

MINNESOTA-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

Form 3024 1/01

VMP -6(MN) (0005)

Page 1 of 15

Initials: *[Signature]*

VMP MORTGAGE FORMS - (800)521-7291

RECEIVED

APR 22 2002

DAKOTA COUNTY  
TREASURER-AUDITOR

(B) "Borrower" is HERBERT FANNIEL AND MARY H. FANNIEL, *husband and wife*

Borrower is the mortgagor under this Security Instrument.

(C) "Lender" is Chase Manhattan Mortgage Corp.

Lender is a Corporation

organized and existing under the laws of New Jersey

Lender's address is 343 Thornall Street

Edison, New Jersey 08837

Lender is the mortgagee under this Security Instrument.

(D) "Note" means the promissory note signed by Borrower and dated January 30, 2002

The Note states that Borrower owes Lender

One Hundred Fifty-Nine Thousand Three Hundred and 00/100ths Dollars  
(U.S. \$159,300.00 ) plus interest. Borrower has promised to pay this debt in regular Periodic  
Payments and to pay the debt in full not later than February 1, 2032

(E) "Property" means the property that is described below under the heading "Transfer of Rights in the  
Property."

(F) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges  
due under the Note, and all sums due under this Security Instrument, plus interest.

(G) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following  
Riders are to be executed by Borrower [check box as applicable]:

<input checked="" type="checkbox"/> Adjustable Rate Rider	<input type="checkbox"/> Condominium Rider	<input type="checkbox"/> Second Home Rider
<input type="checkbox"/> Balloon Rider	<input type="checkbox"/> Planned Unit Development Rider	<input type="checkbox"/> 1-4 Family Rider
<input type="checkbox"/> VA Rider	<input type="checkbox"/> Biweekly Payment Rider	<input checked="" type="checkbox"/> Other(s) [specify] Escrow Impound Rider

(H) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations,  
ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final,  
non-appealable judicial opinions.

(I) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other  
charges that are imposed on Borrower or the Property by a condominium association, homeowners  
association or similar organization.

(J) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by  
check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic  
instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit  
or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller  
machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse  
transfers.

(K) "Escrow Items" means those items that are described in Section 3.

1094578090

124P-6(MN) (0005)

Page 2 of 15

Initials: *HE*  
*CM*

Form 3024 1/01

Legal Description

Lot 17, Block 5, Donnay's Valley Park 6<sup>th</sup>.

(L) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(M) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(N) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(O) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(P) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

#### TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to Lender and Lender's successors and assigns, with power of sale, the following described property located in the COUNTY

of Dakota

See Attached Schedule A

[Type of Recording Jurisdiction]

[Name of Recording Jurisdiction]:

Parcel ID Number:  
7145 UPPER 163RD ST  
ROSEMOUNT  
("Property Address"):

which currently has the address of  
[Street]  
[City], Minnesota 55068 [Zip Code]

1094578090

LMP -6(MN) (0005)

Page 3 of 15

Initials: *LF*  
*MA*

Form 3024 1/01



4-29-03  
2039103

**CORPORATE ASSIGNMENT OF MORTGAGE**

DAKOTA COUNTY, MINNESOTA

SELLER'S SERVICING#: 14978922 "FANNIEL" ADVA02

INVESTOR'S LOAN NO: 109578090

Date of Assignment: 02/21/2002

Assignor: CHASE MANHATTAN MORTGAGE CORPORATION at 10790 RANCHO BERNARDO RD., SAN DIEGO, CA 92127

Assignee:

**CITIBANK, N.A., AS TRUSTEE**

111 Wall Street 5th FL. Zone 2  
New York, New York 10043

Executed By: HERBERT FANNIEL AND MARY H. FANNIEL To: CHASE MANHATTAN MORTGAGE CORPORATION

Mortgage Dated 01/30/2002 and Recorded 05-01-2002 as Instrument/Document No. 1891572 Book/Reel/Liber NA Page/Folio NA In DAKOTA COUNTY, MINNESOTA.

Property Address: 7145 UPPER 163RD ST, ROSEMOUNT, MINNESOTA 55068

KNOW ALL MEN BY THESE PRESENTS that in consideration of the sum of TEN and NO/100ths DOLLARS and other good and valuable consideration, paid to the above named Assignor, the receipt and sufficiency of which is hereby acknowledged, the said Assignor hereby assigns unto the above-named Assignee, the said Mortgage together with the Note or other evidence of indebtedness (the "Note"), said Note having an original principal sum of \$159,300.00 with interest, secured thereby, together with all moneys now owing or that may hereafter become due or owing in respect thereof, and the full benefit of all the powers and of all the covenants and provisos therein contained, and the said Assignor hereby grants and conveys unto the said Assignee, the Assignor's beneficial interest under the Mortgage.

TO HAVE AND TO HOLD the said Mortgage and Note, and also the said property unto the said Assignee forever, subject to the terms contained in said Mortgage and Note.

CHASE MANHATTAN MORTGAGE CORPORATION

On FEB 21 2002 (DATE)

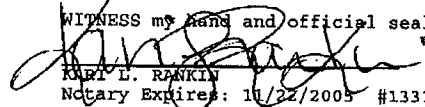
By: 

KEITH DAY, VICE PRESIDENT

STATE OF California  
COUNTY OF San Diego

ON FEB 21 2002, before me, KARI L. RANKIN, a Notary Public in and for San Diego County, in the State of California, personally appeared KEITH DAY, VICE PRESIDENT of CHASE MANHATTAN MORTGAGE CORPORATION, 10790 RANCHO BERNARDO RD., SAN DIEGO, CA 92127, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity, and that by his/her/their signature on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal,

  
KARI L. RANKIN

Notary Expires: 11/22/2005 #1331469



(This area for notarial seal)

Prepared By: Dean Doss, Chase Manhattan Mortgage Corporation, 10790 Rancho Bernardo Rd, San D  
RHT200202210051 GENERIC DAKOTA MN BAT: 4427914978922 KAMOR

When Recorded Return To: Keith Day, Chase Manhattan Mortgage Document Control,  
10790 Rancho Bernardo Rd, San Diego, CA, 92127-

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In Re:

Herbert Fanniel  
Mary Fanniel

MEMORANDUM OF LAW

Debtors

Chapter 7, Case No. 04-34507  
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Citibank, N.A., as Trustee ("Movant"), submits this memorandum of law in support of its motion for relief from the stay in the above-entitled matter.

**FACTS**

Movant holds a valid, duly perfected mortgage on real property owned by the Debtors. On the date this case was filed, the Debtors were delinquent in respect of payments due under the note and mortgage. Since this case was filed Debtors have made no payments to Movant and as of this date the total debt is in the amount of \$182,885.60. The Dakota County Assessor estimates the property value at \$190,000.00.

**ARGUMENT**

Under Section 362(d)(1), the Court shall grant relief from the automatic stay upon a creditors request "for cause, including the lack of adequate protection of an interest in property." Under Section 362(d)(2) relief shall be granted "if the debtor has no equity in the property and the property is not necessary for an effective reorganization".

Under the "equity cushion" theory, a creditor is adequately protected if the Debtors have equity in the property sufficient to shield the creditor from either the declining value of the collateral or an increase in the claim from accrual of interest or expenses. Equitable Life Assurance Society vs. James River Assocs. (In re James River Assoc.), 156 B.R. 494 (E.D. Va. 1993). The amount of equity cushion sufficient to adequately protect a creditor is made on a case-by-case basis. Kost vs. First Interstate Bank (In re Kost), 102 B.R. 829, 831 (D. Wyo. 1989). In Kost, the court observed the following:

Case law has almost uniformly held that an equity cushion of 20% or more constitutes adequate protection. . . . Case law has almost uniformly held that an equity cushion

under 11% is insufficient to constitute adequate protection. . . . Case law is divided on whether a cushion of 12% to 20% constitutes adequate protection.

Id. at 831-32 (citations omitted).

Here, the equity cushion is less than 4 percent. This slight equity cushion, coupled with other factors, shows that Movant is not adequately protected. Debtors have failed to make any payments on the loan for 10 months and interest continues to accrue. Moreover, even if the Debtors succeed in selling the property for a price near the estimated value, the equity will be depleted after payment of the sale and closing costs. Accordingly, Movant is not adequately protected. See In re Kerns, 111 B.R. 777, 789-90 (S.D. Ind. 1990); Bargas vs. Rice (In re Rice), 82 B.R. 623, 627 (Bankr. S.D. Ga. 1987); First Agricultural Bank vs. Jug End in the Berkshires, Inc. (In re Jug End in the Berkshires, Inc.), 46 B.R. 892, 899 (Bankr. D. Mass. 1985); In re Kertennis, 40 B.R. 895, 899 (Bankr. D.R.I. 1984).

Since Movant is not adequately protected, it is entitled to relief from the automatic stay pursuant to §362(d)(1). As there is no true equity here, and the property in a Chapter 7 is not necessary for a reorganization, relief is also appropriate under §362(d)(2).

Accordingly, Movant is entitled to an Order terminating the stay and authorizing it to foreclose its mortgage on the property.

Dated: August 19, 2004

USSET & WEINGARDEN P.L.L.P

By: /E/ Paul A. Weingarden/Brian H. Liebo  
Paul A. Weingarden, #115356  
Brian H. Liebo #277654  
Attorney for Movant  
4500 Park Glen Road, #120  
Minneapolis, MN 55416  
(952) 925-6888

U.S. BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In Re:

Herbert Fanniel  
Mary Fanniel

Debtors

UNSWORN DECLARATION  
FOR PROOF OF SERVICE

Chapter 7, Case No. 04-34507  
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Erin Kay Buss, employed on this date by USSET & WEINGARDEN, attorney(s) licensed to practice law in this court, with office address of Suite 120, 4500 Park Glen Road, Minneapolis, Minnesota 55416, upon penalty of perjury, declares that on August 19, 2004, I served the annexed Notice of Hearing and Motion for Relief from Automatic Stay upon each of the entities named below by mailing to them a copy thereof by enclosing same in an envelope with first class mail postage prepaid and depositing same in the post office at Minneapolis, Minnesota, addressed to each of them as follows:

Office of the United States Trustee  
1015 U.S. Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415

Mary Jo A. Jensen Carter  
Chapter 7 Trustee  
1339 E. County Road D  
Vadnais Heights, MN 55109

Ian Traquair Ball  
Attorney at Law  
12 S. 6th Street, Suite 326  
Minneapolis, MN 55402

Herbert Fanniel  
Mary Fanniel  
7145 Upper 163rd Street West  
Rosemount, MN 55068

/E/ Erin Kay Buss  
Erin Kay Buss

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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In Re:

Herbert Fanniel  
Mary Fanniel

ORDER

Debtors.

Chapter 7, Case No. 04-34507  
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The above entitled matter came on for hearing upon motion of Citibank, N.A., as Trustee, ("Movant"), pursuant to 11 U.S.C. Section 362 on September 7, 2004, at the U.S. Bankruptcy Court, St. Paul, Minnesota. Appearances were as noted in the record. Based upon the evidence adduced at said hearing, the arguments of counsel, and the Court being fully advised of the premises,

IT IS HEREBY ORDERED THAT:

The automatic stay imposed by 11 U.S.C. §362 is hereby terminated as to the real property over which the Movant, its successors and/or assigns, has an interest, said property legally described as follows, to-wit:

Lot 17, Block 5, Donnay's Valley Park 6<sup>th</sup>, Dakota County, Minnesota

Movant may proceed to foreclose its mortgage in accordance with Minnesota Statutes. Movant's request for attorneys fees and costs shall not be considered as this is governed by state law. Notwithstanding Federal Rules of Bankruptcy Procedure 4001(a)(3), this order is effective immediately.

Dated this \_\_ day of \_\_\_\_\_, 2004.

\_\_\_\_\_  
Judge of the Bankruptcy Court